No. 15,039

IN THE

United States Court of Appeals

For the Ninth Circuit

CARL C. LEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

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JURISDICTION.

On September 14, 1955 an indictment in one count was filed against appellant in the United States District Court for the Northern District of California, Southern Division, charging wilful attempt to defeat and evade taxes of appellant and his wife for the year 1950 by the filing of a false and fraudulent joint income tax return in violation of Section 145(b) Internal Revenue Code (R. 3-4). Jurisdiction was conferred on the District Court by 18 United States Code, Section 3231. After a jury trial, appellant was found guilty as charged (R. 4). Sentence was imposed and judgment entered on January 11, 1956 (R. 5-6). Notice of appeal was filed on January 12, 1956 (R. 8-10).

The jurisdiction of this Court is invoked under 28 United States Code, Section 1291.

The judgment of the District Court allowed costs of prosecution to appellee (R. 6) and they were taxed at $987.50 on January 17, 1956 (R. 10-11). Appellant, on January 19, 1956, filed his objection to an item of $434.40 for the cost of a daily transcript (R. 12-13) which was overruled by the trial Court (R. 13-14). Notice of appeal was filed on February 3, 1956. Jurisdiction is invoked under 28 United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE.

The indictment charged appellant with wilfully attempting to defeat and evade a large part of the joint income taxes of himself and his wife for the year 1950 by filing a false return in which he stated that he and his wife had a net income of $9,927.09 on which the taxes amounted to $1,282.00, whereas he knew that their net income was $69,162.69 and he owed taxes of $27,564.42 (R. 3-4). After conviction appellant was sentened to five years imprisonment and fined $10,000 and costs of prosecution (R. 4-6).

Appellant in his statement of the case has failed to inform this Court of the facts which show overwhelming proof of his guilt. He has alluded to the testimony of only one witness (who prepared the Government's summary), and has ignored the unde-

niable and uncontradicted testimony of eleven "patients" who in 1950 paid $90,623.35 (of which $80,333.00 was in cash) for Chinese herb "tea". We will here briefly outline the highlights of the evidence which the jury might have believed.

Mr. DeCoe prepared two 1950 tax returns for appellant from financial statements or memoranda furnished to him (R. 18-19). The return actually filed by appellant with the Director of Internal Revenue was the second 1950 return prepared by DeCoe for appellant and showed a lesser amount of tax than the first return prepared (R. 18-21; Ex. 1). After noting the large amount of tax on the original return, appellant secured new figures for DeCoe to work from. DeCoe could not recall whether the second set of financial statements showed greater deductions on lesser income, but it resulted in a smaller tax (R. 18-20).

Appellant in 1950, and prior thereto, was engaged in dispensing unidentified Chinese herbs, herb medicine, and herb tea to wealthy "patients" from a store in Sacramento, California (R. 29, 37, 40, 52, 54, 61, 63, 66). The prices charged varied from customer to customer, and the patients were told it depended on the strength of the herb elixir supplied (R. 24, 28-29, 37, 43-49, 54, 61, 63). His practice was to charge a varying weekly rate for a daily cup of tea; for example, $25.60 paid by Phelps (R. 63); $35.00 or $40.00 by Frazer (R. 26-29; Ex. 6); $100.00 by Mrs. Cavell (R. 41, 48) and $55.50 by Fernandez (Ex. 37). Most of these weekly payments were made by check

payable to appellant, and they total $10,273.35 for 1950 from eleven known patients (R. 75; Exs. 2, 3, 5, 6, 13, 15, 25, 36, 37).

In addition to the daily cup of tea, appellant sold to various patients a "special" herb for which he required payment in cash. The witness Frazer testified that after taking the $35 a week course of treatments for a month or six weeks, appellant started him on a different and expensive medicine which appellant told him was an herb from China that was smuggled into the country (R. 28-29). Appellant told Frazer he had clients who were paying him $40,000 or $50,000 for this treatment (R. 29, 37). Frazer paid appellant $12,500 for such a 3-month course of treatment, the payment being in cash consisting of $100 bills at the instruction of appellant (R. 30-31, 34, 37). During the Internal Revenue investigation, appellant, on two occasions, sought Frazer out and asked him to testify that the $12,500 represented a loan rather than payment for medical treatment (R. 3-34).

Appellant's attempt to suborn perjury was almost successful, for at the trial Frazer revealed for the first time which testifying that he had actually paid an additional $13,500 to appellant in cash making a total cash payment of $26,000 in 1950 (R. 34-38; Exs. 7, 8, 9, 10).

Mrs. Ila High, secretary to Grace A. Cavell, accompanied her employer on trips to appellant's place of business and kept records of the amounts of check and currency paid to him (R. 38-44; Ex. 24). At his request, Mrs. Cavell paid appellant $1,175 at $100 a

week by check and made various payments of currency aggregating $6,600 (Exs. 24, 25). Appellant requested that no record be made of these transactions (R. 41) and when he learned of the existence of the record during the Treasury investigation, he sought out Mrs. Cavell and asked her to testify falsely that she had seen him hand the money on to another person (R. 50-51).

The herbs were represented as being very expensive, taking a long time to grow in China, and would speed Mrs. Cavell's recovery and probably guarantee she would live twenty years (R. 44-46). During negotiations as to price, appellant suggested different strengths of the medication and quoted prices varying from $75,000 for a "synthetic" herb fluid to $327,500 for the "super" (R. 46-48, Ex. 32). Mr. Phelps, another patient, recommended appellant's herb tea to Mrs. Cavell as having saved his life and said that it was very expensive (R. 49).

Phelps testified that the amount paid by him to appellant prior to 1950 was "considerable"—twenty or thirty thousand dollars" (R. 66-67). He also recited the cup-of-tea-a-day ritual, for which he paid $25.60 each week by check (Ex. 46), and said that he also made currency payments of $1,900 in 1950 (R. 63-64; Exs. 47-51 incl.). The reason payment was by cash was that appellant asked for it (R. 66). During the investigation appellant had told Phelps of the examination of his returns and asked him to report to the agents that he had paid by check only and no cash (R. 67-68).

The witness Harmon also paid appellant in currency at his request although some payments were by check (R. 23-24). None of the witnesses was presented with a bill or given a receipt for the payments made (R. 23, 27, 42, 53-54, 62). Appellant asked his clients not to make records of the transactions with him (R. 41, 51).

John Fernandez testified that he had paid currency in advance to appellant, at his request, for some herbs from China which Fernandez described as tea (R. 54, 58). He produced checks to appellant for $55.50 a week (Ex. 37) and cancelled checks to cash in the amount of $1,000 (Ex. 38); $15,000 (Ex. 39); $22,750 (Ex. 40); $2,750 (Ex. 41); $2,000 (Ex. 42); and $2,000 (Ex. 43) and testified that these amounts totalling $45,500 had been paid in cash to appellant in 1950 (R. 52-62). The total sum appellant requested of Fernandez for his course of treatment aggregated $120,000 and he represented the treatment would put Fernandez "80% normal" (R. 59-60).

Agent Kerdus testified he had never seen the books and records of appellant and that it was only by extensive investigation of records of banks that he was able to locate the eleven patients who testified (R. 69-70). The exhibits in evidence and testimony established $10,293.35 paid by check to appellant and $80,330.00 paid in currency in one year, thus aggregating total receipts of $90,623.35. Appellant's income tax return reported gross receipts of $15,887.75 (Ex. 1).

As its last witness, the Government called Augustus V. Brady, who was qualified as an expert witness in

tax calculations, and who had been present throughout the course of the trial and had examined all the exhibits. (R. 71-72). He testified that in his computations he had allowed the business deductions, personal deductions and exemptions as claimed on the return (R. 72-73; Ex. 1). He was asked if he had made a summary of appellant's business receipts in 1950. The question was objected to and when allowed to answer, the witness answered that he had done so from the testimony and exhibits in evidence. He was then asked for a breakdown of the manner in which he arrived at the total figure of gross receipts (R. 75). Appellant's counsel objected, but said "I have no objection to stating the total." (R. 75). The totals were then given as $80,333.00 in cash receipts, and $10,293.35 by check for a total of $90,623.35 from eleven patients (R. 75). Brady then subtracted the amount of gross income reported (Ex. 1) of $15,887.75 from the $90,623.35 gross income to arrive at $74,735.60 gross income unreported (R. 75-76). No objections were made to this testimony.

Brady then testified that he had subtracted the amounts of business expense as claimed on the return and the standard deduction for personal allowable deductions in arriving at net income (R. 76-78). This testimony was objected to (R. 76-78). Brady was then asked to compute the tax by a hypothetical question assuming the net income figure of $84,662.69 testified to and assuming the accuracy of the deductions and credits on the return. He answered that the tax would be $36,938.80 as compared with $1,282.00 reported (R. 78). Exhibit 52, the written schedule of Brady's testi-

mony, was not offered in evidence (R.79). Appellant did not cross-examine (R. 78), and the Government rested (R. 79).

Appellant did not take the stand to testify in his own defense.

The statement relating to taxation of costs of the daily transcript is set forth in the Argument, Part V.

STATUTE INVOLVED.

Internal Revenue Code: Sec. 145. Penalties.

* * * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.* Any person required under this chapter to collect, account for, pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * *

[26 U.S.C. 145]

QUESTIONS PRESENTED.

1. Whether the testimony of an expert witness, based on the testimony and exhibits in evidence was

inadmissible as hearsay because not given in response to hypothetical questions.

2. Whether the instructions on intent were correct.

3. Whether appellant was entitled to an instruction that failure to pay tax is a lesser offense included in the felony of wilfully attempting to defeat and evade tax.

4. Whether the cost of a daily transcript was properly allowed to appellee as necessarily obtained for use in the case.

SUMMARY OF ARGUMENT.

I and II. Appellant concedes the accuracy of the calculations of the witness Brady, who summarized the figures contained in numerous documents admitted into evidence. On six occasions it was made clear that his computations were based on the testimony and exhibits in evidence and not on his personal knowledge. This method of questioning based on the record has been approved in *United States v. Johnson,* 319 U.S. 503, and, in any event, it was harmless error if error at all.

III. The jury was fully and correctly instructed on intent in the general charge of the Court, and appellant was not entitled to an additional instruction enumerating acts or conduct which did not constitute intent; especially since there was no evidence of such acts or conduct to support the requested instruction.

IV. The requested instruction that wilful failure to pay tax is a lesser offense included in the charge of attempted evasion of tax was properly refused.

(a). The offenses are separate and distinct, and the one is not necessarily included in the other since they require different proof.

(b). There was no reasonable view of the evidence whereby the jury could have found appellant guilty of the failure to pay tax without being obliged to find him guilty of evasion of tax.

(c). The instruction was so hopelessly incomplete it could only have resulted in confusing the jury.

V. The costs were properly taxed. The daily transcript was necessarily obtained for use in the case, and it was properly allowed in the discretion of the trial judge.

ARGUMENT.

I. THE SUFFICIENCY OF THE EVIDENCE IS NOT QUESTIONED.

"Unlike many other trapped tax-evaders, the appellant does not maintain, like Abimeleck of Gerar, that in the integrity of my heart and innocency of my hands have I done this." [Gen. 20:5]. *Campodonico v. United States,* 222 F. 2d 310 (C.A. 9, 1955) certiorari denied 350 U.S. 831. He does not challenge the overwhelming and uncontradicted proof that he received from eleven witnesses alone almost six times the amount of gross income and over eight times the

amount of net income he disclosed to the Government in his return. On the contrary, he at least impliedly concedes his guilt, but complains that questions to a witness were not couched in terms of technical nicety and that the instructions of the court were erroneous.

II. BRADY'S TESTIMONY WAS PROPERLY ADMITTED.

Appellant contends that the summary testimony of the witness Brady (R. 72-78) was inadmissible as hearsay and prejudicial because not elicited in response to artfully framed hypothetical questions (App. B. 11-17). At the trial he did not avail himself of the opportunity to cross-examine Brady (R-78), and he does not now question Brady's qualifications or the accuracy of his computations or the evidence on which they were based.

The propriety of summary accounting testimony in complicated tax cases is too well established to dispute.[1] Such testimony is to aid the jury in correlating and understanding the otherwise disconnected and involved mathematical problems presented by the numerous exhibits, and it does not invade the province of the jury. *United States v. Johnson,* 319 U.S. 503, rehearing denied 320 U.S. 808. Nor does appellant

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[1] *Bateman v. United States,* 212 F.2d 61 (C.A. 9, 1954); *Cooper v. United States,* 9 F.2d 216 (C.A. 8, 1925); *Graves v. United States,* 191 F.2d 579 (C.A. 10, 1951); *Paschen v. United States,* 70 F.2d 491 (C.A. 7, 1934); *Remmer v. United States,* 205 F.2d 277, 289 (C.A. 9, 1953); *United States v. Mortimer,* 118 F.2d 266 (C.A. 2, 1941).

contend otherwise. He bases his claim of error solely on the ground that since Brady's testimony was not given in response to properly couched hypothetical questions, it was likely that it carried more weight with the jury than it was entitled to (App. Br. 16).

The jury could not possibly have been misled as to the source of Brady's figures, or have believed that he was testifying from personal knowledge. On six separate occasions it was clearly brought out that Brady's summary was based on the testimony and exhibits in evidence:

> R. 72: A. Mr. Lockley, I made a computation which I considered a computation of net income based on a summary of receipts from the testimony and exhibits in evidence.
>
> * * * * * * *
>
> R. 73: A. No. I took the income as shown on the return, the deductions shown on the return, and just added to the business income the difference between the receipts testified to here from exhibits and testimony and receipts as shown on the income tax return.
>
> * * * * * * *
>
> R. 74: A. I made a summary of receipts from the testimony and exhibits here in evidence.
>
> * * * * * * *
>
> R. 75: Mr. Johnston. I am going to object your Honor that this again is hearsay testimony. I have no question about Mr. Brady's qualifications and I assume that all he has done is total up a list of figures here and it is purely a mathematical computation, why, I have no objection to stating the total.

The Court. I assume it purports to be a summary or summation?

The Witness. Yes, sir.

* * * * * * *

R. 76: The Court. All of this testimony as I gather it and view it is predicated upon either testimony offered in this court or written records including the return of the credit, is that correct?

The Witness. Yes, your Honor.

* * * * * * *

R. 77: The Court. Thus far the testimony has been predicated upon the record, hasn't it?

Mr. Lockley. That is correct.

* * * * * * *

The Supreme Court has placed its stamp of approval upon the identical type of questioning as employed here in the tax evasion case of *United States v. Johnson,* 319 U.S. 503, 519 (1943), rehearing denied 320 U.S. 808. The Court of Appeals for the Seventh Circuit had reversed Johnson's conviction, in part because in examining the Government's expert "Not a single question by which the objectional answers were elicited contains any assumption or hypotheses." 123 F.2d 111, 127. (But see Judge Evans dissent at page 138). In reversing the Court of Appeals and affirming the conviction of Johnson, the Supreme Court said (p. 519):

> "A ruling on evidence, much pressed upon us, must finally be noticed. The court below held that the admission of the testimony of an expert witness regarding Johnson's income and expenditures during the disputed period invaded the jury's

province. The witness gave computations based on substantially the entire evidence in the record as to Johnson's income. The Circuit Court of Appeals held that while undoubtedly 'a proper hypothetical question could have been framed and propounded,' in fact the witness was not giving answers on the basis of any assumption or hypothesis but as testimony on the 'controverted issue' in the case. 123 F.2d at 128. We do not so read the meaning of this testimony. No issue was withdrawn from the jury. The correctness or credibility of no materials underlying the expert's answers was even remotely foreclosed by the expert's testimony or withdrawn from proper independent determination by the jury. The judge's charge was so clear and correct that no objection was made, though, of course, there were exceptions to the refusal to grant the usual requests for charges that were either redundant or unduly particularized items of testimony. The worth of our jury system is constantly and properly extolled, but an argument such as that which we are rejecting tacitly assumes that juries are too stupid to see the drift of evidence. The jury in this case could not possibly have been misled into the notion that they must accept the calculations of the government expert any more than that they were bound by the calculations made by the defense's expert based on the defendants' assumption of the case. So long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's we ought not be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and

> in the appropriate submission of evidence within the general framework of familiar exclusionary rules."

See also *Remmer v. United States,* 205 F.2d 277, 289 (C.A. 9, 1953), reversed on other grounds 347 U.S. 227 and 350 U. S. 377; *Legatos v. United States,* 222 F.2d 678, 684 (C.A. 9, 1955); *Hanson v. United States,* 186 F.2d 61 (C.A. 8, 1950); *Beaty v. United States,* 213 F.2d 712 (C.A. 4, 1954) judgment vacated 348 U.S. 905, reaffirmed 220 F.2d 681, cert. denied.

Appellant fails to suggest that the testimony was in any degree inaccurate; or that complex hypothetical questions would have resulted in any different answers. He failed to ask even one question on cross-examination. In fact, he acquiesced in the testimony stating only the total figures, and no efford was thereafter made to have Brady testify as to the various items contained in his totals (R. 75). Nor did he object to the instructionse given on the evaluation of the testimony of expert witnesses (R. 96).

Clearly, if there was error at all, which we vigorously deny, it was harmless error and did not affect substantial rights. Rule 52, Federal Rules of Criminal Procedure.

III. THE COURT'S INSTRUCTIONS ON INTENT WERE CORRECT AND COMPLETE.

Appellant next contends that it was error to refuse a requested instruction based on the decision of this

Court in *Bloch v. United States,* 221 F.2d 786 (C.A. 9, 1955), rehearing denied 223 F.2d 297.[2] What he fails to observe is that the jury was properly instructed on the element of intent. They were told repeatedly that the attempt to evade tax must be a specific wilful attempt (R. 86, 91, 92, 93, 94, 95). He now appears to contend that in addition to being told affirmatively what constitutes wilful intent the jury should be instructed negatively as to what is not wilful intent.

The length to which the court went in making it clear that specific intent to evade tax is a necessary element of the offense can only be measured by a complete reading of the instructions (R. 91-95). Some appreciation of the thoroughness of the charge may, however, be gained from the following excerpts (R. 91-93):

> ". . . The gist of the offense charged in the indictment is a wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word 'attempt', as used in this law, involves two things:
>
> "1. An intent to evade or defeat the tax, and,
>
> "Second, some act done in furtherance of such intent.

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[2]The instruction requested was as follows:

> "There is only one state of mind that will supply the intent necessary to warrant a conviction in this case, and that is the intent to defeat or evade the tax due. Filing a false return with any other bad purpose would not supply the necessary intent. Nor would filing a false return without a justifiable excuse, or without ground for believing it to be lawful, or with a careless disregard for whether or not one has the right so to do, constitute, in themselves, the intent which is required by the law. You may find the defendant guilty in this case only if you find that he knowingly filed a false return with the intention of evading or defeating the tax due."

"The word 'attempt' contemplates that the defendant had knowledge and understanding that during the calendar year 1950 he had an income in such year which was taxable, and which he was required by law to report, and that he attempted to exade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar year and which he knew it was his duty to state in his return for such year.

"There are various schemes, subterfuges and devices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing a false and fraudulent return with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.

"The attempt to evade and defeat the tax must be a wilful attempt; that is to say, it must be made with the intent to keep from the government a tax imposed by the income tax laws which it was the duty of the defendant to pay the government. The attempt must be wilful, that is, intentionally done with the intent that the government should be defrauded of the income tax due from the defendant at bar.

"If you find, ladies and gentlemen, that a fraudulent return was filed with intent to defeat a part or all of the tax, and that this was done wilfully, the crime is complete as soon as the filing takes place.

"Before the defendant in this case can be found guilty of the alleged charge set forth in the indictment, it must be established by the evidence beyond a reasonable doubt that the defend-

ant had the specific intent to commit the acts therein alleged.

"If, in your judgment as jurors, the prosecution fails to prove such specific intent beyond a reasonable doubt, or if after considering all of the evidence, you or any of you entertain a reasonable doubt as to whether the defendant had such specific intent, then you must return a verdict finding the defendant not guilty.

"The gist of the offense is an act done with a fraudulent purpose. An honest error, whether due to incompetence of bookkeepers or to carelessness or ignorance on the part of the defendant or to some other cause would not support a finding of wilfulness. Good faith is a complete defense to the charge alleged in the indictment . . ."

The Court not only specifically charged that intent was an essential element of the offense, that is, bad faith, but that good faith was a complete defense (R. 93). *Bateman v. United States,* 212 F.2d 61 (C.A. 9, 1954).

Having been fully covered by the general charge of the Court, the instruction here requested was properly refused. *Coffin v. United States,* 162 U.S. 664, 672; *Agnew v. United States,* 165 U.S. 36, 51.

In *Friedberg v. United States,* 207 F.2d 777 (C.A. 6th), affirmed 348 U.S. 142, an income tax evasion case under Section 145(b), the trial Court charged:

"As to all counts, if any, you find the Government has proved beyond a reasonable doubt, the defendant attempted to defeat or evade the tax,

> you must next consider whether or not such attempted evasion, if any, was willful. In this connection the Court instructs you that the word 'willful' means not only intentional or knowing, but 'done with a bad purpose * * * without justifiable excuse * * * stubbornly, obstinately, and perversely.'"

Of the trial Court's instructions in *Friedberg,* the Court of Appeals said:

> "* * * the court delivered to the jury a clear and correct charge, in which the rights of appellant were fully protected with extreme care, * * *"

In reviewing the conviction, the Supreme Court found no error at all in the trial Court's instructions.

Certainly, one of the prerogatives of a federal trial judge is to phrase his own charge. If it states the applicable law correctly, as this charge did, defendant may not be heard to complain that it offends his literary taste. *Barshop v. United States,* 191 F.2d 286 (C.A. 5, 1951), cert. denied 342 U.S. 920 (1952); *Wright v. United States,* 175 F.2d 384 (C.A. 8, 1949), cert. denied 338 U.S. 873 (1949); *United States v. Smith,* 206 F.2d 905 (C.A. 3, 1953).

Moreover, the Court properly refused the instruction since it would only have confused the jury. There is nothing in the record to support the theory that the return was filed with any other bad purpose, or without justifiable excuse, or without ground for believing it lawful, or with a careless disregard. The evidence of the prosecution established receipt of cur-

rency and a wilful intent to evade tax by filing the false returns. The defense was simply that appellant never received the sums of money in question (R. 36, 62), and it follows that the defense theory was that the return was correct. The refusal to give an instruction embodying even a correct legal proposition is not error unless there be evidence rendering the legal theory applicable to the case. *Coffin v. United States,* 162 U.S. 664, 667.

The requested instruction is a negative expression of an instruction this Court found fatal in *Bloch v. United States,* 221 F.2d 786 (C.A. 9, 1955), rehearing denied 223 F.2d 297. Whatever vitality the opinion of this Court in *Bloch* retains in view of the later decisions in *Brown v. United States,* 222 F.2d 293 (C.A. 9, 1955), and *Herzog v. United States,* 226 F.2d 561 (C.A. 9, 1955), reaffirmed May 29, 1956 after hearing *en banc,* it has no bearing on this case. The instructions found erroneous in *Bloch* were not given herein. The jury was properly informed of the requirement of specific intent and appellant was entitled to no more.

IV. THE INSTRUCTION ON LESSER INCLUDED OFFENSE WAS PROPERLY REFUSED.

Appellant was charged with a felony under Section 145(b), Internal Revenue Code of 1939. He requested an instruction that the jury might find him guilty of the misdemeanor of wilful failure to pay his correct income tax under Section 145(a) (R. 8, 101-102). The

request was denied. He contends that the misdemeanor offense of failure to pay tax is contained in the felony offense of evasion of tax and that under Rule 31(c) of the Federal Rules of Criminal Procedure he was entitled to the instruction. Pertinent portions of Sections 145(a) and (b) are quoted in footnote[3] below. The requested instruction was as follows (R. 8):

> "The defendant is charged with wilfully attempting to evade and defeat his income taxes and those of his wife for the calendar year 1950, an offense which is a felony. If you are not convinced that the defendant is guilty of this offense, but you are convinced beyond a reasonable doubt that he wilfully failed to pay his correct income tax for the year 1950, you may find him guilty of this lesser offense, which is a misdemeanor."

Appellant concedes that the precise point presented here has been raised and rejected in *Dillon v. United States,* 218 F.2d 97 (C.A. 8, 1955), cert. granted 349 U.S. 914, cert. dismissed 350 U.S. 906. The Court of Appeals said (p. 100-101):

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[3]"Section 145(a). Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, * * * be guilty of a misdemeanor * * *."

(b) "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, * * * be guilty of a felony * * *."

"Defendant was charged with a felony under Section 145(b), 26 U.S.C.A., Section 145(b). He requested an instruction that the jury might find him guilty of a lesser offense—specifically, a misdemeanor under Section 145(a), 26 U.S.C.A., Section 145(a), or Section 3616(a), 26 U.S.C.A. Section 3616(a). The request was denied. He contends that the lesser offenses defined in Section 145(a) and Section 3616(a) are included in the greater defined by Section 145(b) and that under Rule 31(c) of the Federal Rules of Criminal Procedure, he was entitled to the instruction. The pertinent portions of Section 145(a), Section 145(b) and Section 3616(a) are quoted in the footnote.

"As stated in *Spies v. United States,* 317 U.S. 492, 493, 63 S. Ct. 364, 365, 87 L.Ed. 418, 'Section 145(a) makes, among other things, willful failure to pay a tax *or* make a return * * * a misdemeanor. Section 145(b) makes a willful attempt in any manner to evade or defeat any tax * * * a felony.' The indictment did not charge, nor did the evidence show, that defendant merely failed to pay a tax or failed to make a return. On the contrary, the evidence showed that a return was filed and a tax was paid. No evidence was offered that defendant failed to file a return or to show the willful failure to pay the tax when due, except insofar as willfulness was involved in the charged willful and felonious attempt to evade the payment of taxes owed. Hence the universal rule that it is not error to fail to instruct on an offense not presented by the evidence applies. There consequently was no error in failing to instruct that defendant might have been convicted of either of the misdemeanors defined in Section 145(a), of

> willful failure to pay a tax when due or willful failure to file a return * * *"

Although calling attention to the recent opinion in *Berra v. United States,* 351 U.S. 131, affirming 221 F.2d 590 (C.A. 8, 1955), appellant claims it is "clearly distinguishable." Prior to the Supreme Court's decision of that case, however, he told this Court in his "Memorandum of Points and Authorities in Support of Motion for Bail Pending Appeal" (p. 4):

> "Substantially the same question was raised in *Berra v. United States* (C.A. 8, 1955), 221 F.2d 590, cert. granted December 5, 1955, 76 S.Ct. 190. There the defendant, who was similarly charged with an offense under Section 145(b) requested an instruction that the jury might find him guilty of the misdemeanor under Section 3616(a) of the Internal Revenue Code."

We agree with appellant's first appraisal of the *Berra* case; that it presents substantially the same question and answers it adversely to him.

Additionally, however, there are three separate reasons why the instruction was properly refused:

1. The offenses proscribed in Section 145(a) are separate and distinct from those condemned by Section 145(b) and are therefore not necessarily included within the latter. The theory of the "necessarily included" offense postulates a gradation in which the greater offense contains some aggravating element not found in the lesser. Whether an offense is "necessarily included" in another depends on a comparison

of the substantive elements of the two offenses. The lesser included offense must be in substance a lower grade of the offense charged. *Berra v. United States,* supra; *Stevenson v. United States,* 162 U.S. 313, 315. To be "necessarily included" the offense must be lesser in the sense that it contains the same, but not all, the elements of the greater offense. *Ekberg v. United States,* 167 F.2d 380, 385 (C.A. 1st 1948). See *I Wharton, Criminal Law* (12th Ed., 1932), Section 33. The offense of wilfully failing to pay a tax is not included within a wilful attempt to evade or defeat the tax, but is a separate offense requiring different proof. Cf. *United States v. Kafes,* 214 F.2d 887, 890-891 (C.A. 3rd 1954), certiorari denied, 348 U.S. 887. It seems clear that a taxpayer could be guilty of all the acts of omission proscribed by Section 145(a) without committing any affirmative act of evasion required to make out the felony. *Spies v. United States,* 317 U.S. 492, 498-499. It follows that violation of Section 145(a) is not "necessarily included" in a charged violation of Section 145(b) because the offenses are entirely separate and distinct, each involving elements of proof not required for the other.

2. There was no reasonable view of the evidence under which the jury could have acquitted the defendant of the felony and convicted him of the misdemeanor. One offense is not "necessarily included" in another merely because the proof might support his conviction of either offense. The purpose of Rule 31(c) is to enable the jury, where the evidence does not show the defendant to be guilty of the crime

charged, to find him guilty of a lesser "necessarily included" offense, if the evidence so permits. *Sparf v. United States,* 156 U.S. 51, 63. In the present case the jury could not possibly find that the defendant *wilfully* failed to pay his tax unless it found that he had knowingly and deliberately understated his tax liability in his return. But if it so found it would have been obligated to return a verdict of guilty of wilful attempted income tax evasion, since it would then have no reasonable doubt that all of the essential elements of the felony had been proved.

In other words, there was no basis of fact which could have warranted the jury in choosing as between a violation of Section 145(a) or of Section 145(b). The refusal of a requested instruction on an abstract proposition of law which is not sustained by the evidence in general is not error. *Benatar v. United States* (C.A. 9, 1954), 209 F.2d 734, cert. denied 347 U.S. 974; *United States v. Stoehr* (C.A. 3 1942), 196 F.2d 276, cert. denied 344 U.S. 826. As in *Dillon,* supra, the indictment did not charge, nor did the evidence show, that appellant merely failed to pay a tax. On the contrary, the evidence showed that a return was filed and a tax paid.[4] Under the circumstances of the case, where the evidence tended to show the commission of the crime charged, it would have been proper for the Court to instruct the jury that there could be no conviction for a less included offense; *Sparf v.*

[4]So far as a defense was offered, it was based on the theory that appellant had not received the additional fees and therefore owed no additional tax (R. 36, 62).

United States, supra; and the included offense instruction should not be given unless justified by the evidence. *Burcham v. United States,* 163 F.2d 761 (App. D.C. 1947).

To show prejudice in the refusal of requested instructions, it must be shown that there was evidence to which such instructions were properly applicable. *Sweeney v. Erving,* 228 U.S. 233, 242; *Bird v. United States,* 187 U.S. 118. "Appellant has not made nor attempted to make such showing. He has pointed out no evidence to which the requested instruction might have been applied. The burden of searching the evidence for such evidence rested upon appellant's counsel and should not be assumed by this Court." *Walton v. Wild Goose Mining & Trading Co.,* 123 F. 209, 219 (C.A. 9).

3. The requested instruction was so incomplete that it could only have resulted in hopelessly confusing the jury. It did not even make an attempt to define the essential elements of the misdemeanor; nor did it purport to provide the jury with standards for distinguishing between the two offenses, i.e., what aggravating element or elements are required for the felony but not the misdemeanor. It gave the jury no real guidance and in effect would have left the choice to the jury's caprice with little or no regard to the evidence.

The Court may refuse to charge a request which does not correctly embody the law applicable to the case, *Holmgren v. United States,* 217 U.S. 509, 523; and the instruction requested must be applicable to and based on evidence in the cause. *Lonergan v.*

United States, 88 F.2d 591 (C.A. 9, 1937); *Beavers v. United States,* 3 F.2d 860 (C.A. 6, 1925).

V. COSTS WERE PROPERLY TAXED.

The judgment of the District Court entered on January 13, 1956 allowed costs of prosecution to appellee (R. 6). On the same day appellee made application to the Clerk, pursuant to Rule 23 of the Rules of Practice, United States District Court, Northern District of California,[5] for costs totalling $987.50, including $434.40 as fees to the Court Reporter for all or any part of the transcript necessarily obtained for use in the case (R. 10-11).

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[5]Rule 23 provides, insofar as material, as follows:

(a) *Taxation of Costs.*

(1) *Application to the Clerk.* Within five days after notice of the entry of a judgment allowing costs, the prevailing party shall serve on the attorney for the adverse party and file with the Clerk an application for the taxation of costs. The application shall contain an itemized schedule of the costs and a statement signed by the attorney for the applicant that the schedule is correct and that the costs were necessarily incurred. The application shall be heard by the Clerk, not less than one nor more than three days after it is served, and notice of the time of hearing shall be endorsed upon it.

Upon failure to comply with this rule, all costs, other than the Clerk's costs, which may be inserted in the judgment without application, shall be waived.

(2) *Objections.* Upon the hearing, specific objections, supported by affidavits or other evidence, may be made to any item of costs. The Clerk shall thereupon tax the costs, and if there is no appeal, shall insert the amount of costs taxed in the blank left in the judgment, and also in the docket.

(3) *Review.* A dissatisfied party may take an immediate oral appeal to the Court from the decision of the Clerk if the opposing party is present; or may appeal upon written motion served within five days of the Clerk's decision, as provided in Rule 54(d), Federal Rules of Civil Procedure. Appeals shall be heard upon the same papers and evidence submitted to the Clerk.

On January 17, 1956, the time set for hearing on the cost bill, appellee appeared before the Clerk and, no objections being made by appellant, costs were taxed in full at $987.50 (R. 11). Appellant filed his objections to costs on January 19, 1956 (R. 12-13), limited to the item of fees to the Court Reporter. On January 26, 1956 the Court entered an order allowing the cost upon the finding that the stenographer transcript was necessarily obtained by appellee for use in the trial of the case (R. 13-14).

Taxation of fees of the Court Reporter for the transcript furnished to the prevailing party is authorized by Title 28 United States Code, Section 1920(2) which specifically provides as follows:

> "Section 1920. *Taxation of costs.*
>
> "A judge or clerk of any court of the United States may tax as costs the following:
>
> * * * * * * *
>
> "(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;"
>
> * * * * * * *

It is entirely within the discretion of the Court whether costs should be taxed at all in a non-capital criminal case. Title 28 United States Code, Section 1918 (b). The practice as to the imposition of costs is the same in criminal cases as in civil. *Bozel v. United States,* 139 F.2d 153 (C.A. 6, 1943), cert. denied 321 U.S. 800, rehearing denied 322 U.S. 768.

In *Perlman v. Feldmann* (D.C. Conn. 1953), 116 F.Supp. 102, the prevailing party was granted re-

imbursement for the average cost of a single copy of the daily transcript as being reasonably necessary for use on trial (the cost of additional copies was classed as incurred for convenience and was disallowed). In arriving at its decision the Court considers the historical background of the statute and concludes that if "* * * a trial transcript obtained by a party is not taxable, Paragraph 2 was a completely unnecessary addition to Section 1920 of the new Code * * *" (at page 108). In determining whether the transcript was "necessarily obtained", the Court took into consideration such matters as the complication of the issues; the length of the trial (7 days); the assistance of the transcript to counsel in argument and to the Court in evaluating the various claims of fact asserted; and the extent of the use of the transcript by counsel as observed by the Court.

Judged by these same standards, it seems obvious that the transcript in the instant trial was necessary because of the length of the trial (6 days of testimony); the number of witnesses heard (20); the number and nature of the exhibits (68) the mathematical complexity of the evidence which required resort to the transcript for proper summation by the witness Brady and in closing argument; and the fact that the defendant purchased a copy of the transcript for his own use which required a similar purchase by the Government to protect its interests. The trial Court, from its own knowledge, can determine the extent of the necessity of such a transcript from personal observation during the trial.

The allowance of the expense of the transcript appears to depend in large part upon local practice and, in the jurisdictions for which cases on the point are available, the practice favor the granting of the cost of the transcript to the prevailing party. *Donato v. Parker Pen Company* (S.D. N.Y. 1945), 7 F.R.D. 148; *Brookside Theatre Corp. v. 20th Century-Fox Film Corp.* (W.D. Mo. 1951), 11 F.R.D. 259; *Stein v. Rosenthal* (S.D. Cal. 1952), 103 F.Supp. 227, at p. 232. (In the last cited case the Court allowed the basic cost of the transcript but ruled that the circumstances did not warrant the additional cost of a daily copy); *Weiss v. Smith* (D.C. Conn. 1952), 103 F.Supp. 736; *Kenyon v. Automatic Instrument Company* (W.D. Mich. 1950), 10 F.R.D. 248, at p. 254; *Eickhoff v. Vulcan Iron Works* (N.D. Pa. 1952), 2 F.R.D. 490.

In *Consolidated Fisheries Co. v. Fairbanks, Morse & Co.* (E.D. Pa. 1952), 106 F.Supp. 714, the Court allowed the costs of one copy of the transcript at non-daily rates and disallowed the charge for an extra copy.

The trial judge found that the stenographic transcript was "necessarily obtained" for use in the trial of the case. The statute requires no more. Absent a showing of a clear abuse of discretion, which appellant does not allege, the order should not be disturbed.

VI. APPELLANT'S FAILURE TO SUFFICIENTLY DESIGNATE THE RECORD.

One additional matter should be called to the attention of the Court. Appellant has indulged in a practice which is threatening to become endemic in this Court. Despite the requirements of Rule 17(6) of the Rules of this Court requiring appellant to file a designation of "all of the record which is material to the consideration of the appeal", he failed to have printed any testimony except that of the witness Brady who merely computed the tax. In this case the Government, in order that the Court might be informed as to the facts of the case, was forced to submit to the inconvenience and expense of printing 53 pages of the record. Among other things, appellant argues that the Court should have instructed concerning an allegedly lesser and included offense. It is difficult to see how the Court could come to any conclusion in this respect without the facts of the case before it. It appears, therefore, that appellant's failure was material to this Court's consideration of the appeal. However, appellant, in this case, as has been done in other cases (*Kremen et al. v. United States,* No. 14,359, for example) apparently relies on Rule 25(4) of the Court which appears not to permit allowance of the government's costs. We invite the Court to consider whether this means of transferring the costs of appeal to the Government is within the spirit of the Rules of the Court of Appeals for the Ninth Circuit. We particularly draw the Court's attention to Rule 17(6) providing *inter alia* "If at the hearing it shall appear that any material part

of the record has not been printed, the appeal may be dismissed, or *such other order made as the circumstances may appear to the court to require.*" (Emphasis added.)

CONCLUSION.

For the reasons stated, the judgment and order appealed from should be affirmed.

Dated, San Francisco, California,
June 18, 1956.

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